



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

CRS
Docket No: 3198-00
13 October 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 12 October 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Assistant Staff Judge Advocate for Military Law, Headquarters Marine Corps dated 14 July 2000, a copy of which is attached. The Board also considered your rebuttal statement of 16 August 2000.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070

JAM4

14 JUL 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

Encl: (1) MARADMIN 166/98
(2) MARADMIN 002/00

1. We are asked to provide an opinion on Petitioner's request that his nonjudicial punishment (NJP) be expunged from his service record book (SRB) and that he be reinstated in the grade of sergeant. Although not explicitly requested, Petitioner also effectively requests that he be reinstated in the Marine Corps Enlisted Commissioning Education Program (MECEP).

2. We recommend that the requested relief be denied. Our analysis follows.

3. Background

a. Petitioner asserts that he was notified on 3 June 99 of his selection for MECEP. On 6 June 1999, Petitioner received NJP for disobedience of a lawful order in violation of Article 92, UCMJ. Petitioner was awarded a reduction in grade to corporal (E-4). Petitioner appealed his punishment on the grounds that it was unjust and disproportionate to the offense. Petitioner's appeal was denied.

b. Petitioner received NJP for violating a lawful order from his commanding officer and his officer in charge to have no personal, business, or social contact, outside of official functions, with Lance Corporal Simonson, a female subordinate. This order was given after an investigation was completed into allegations that Petitioner was engaged in an inappropriate relationship with [REDACTED]. Petitioner was repeatedly counseled concerning the parameters of the order; despite this counseling, on 4 June 1999, Petitioner violated the order by having Lance Corporal Simonson baby-sit his son.

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IN THE CASE OF [REDACTED]
USMC

4. Analysis

a. Petitioner asserts four grounds for the relief he requests. First, that he did not understand the order, and that he would not have had Lance Corporal Simonson baby-sit his son had he known it was a violation of that order. Second, that he was not provided with effective counsel prior to accepting NJP. Third, that the punishment was disproportionate to the offense. Fourth, that he would not have accepted NJP had he known that it would affect his acceptance to MECEP.

b. Petitioner's claim that he did not understand the order is without merit. Petitioner was ordered by his commanding officer and officer in charge to have no personal, business, or social contact, outside of official functions, with [REDACTED]. Petitioner was subsequently, and repeatedly, counseled on the type of contact he was allowed to have with Lance Corporal Simonson. Petitioner's argument that he thought baby-sitting would not violate the order because it was "business" vice social is therefore without merit. He was ordered to avoid all non-work related contact, yet still sought it out.

c. Petitioner's claim that he was not provided with effective counsel prior to accepting NJP is without merit for two reasons. First, given that a presumption of regularity attaches to official records, petitioner has offered no evidence to contradict his signed statement that he voluntarily, knowingly, and intelligently declined the opportunity to talk to an attorney. Second, service members are not entitled to consult with counsel before imposition of NJP. Although the opportunity to consult with counsel is a prerequisite for admission of records of NJP as sentencing evidence at a subsequent court-martial, it is not a prerequisite to the imposition of NJP itself. Accordingly, Petitioner is not entitled to any relief on the grounds that he did not receive effective counsel.

d. Petitioner's claim that the punishment was disproportionate to the offense is without merit. Petitioner deliberately violated a lawful order by continuing a relationship that undermined the good order and discipline of his unit. The punishment awarded was within the authority of

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IN THE CASE OF CPL [REDACTED]
[REDACTED]

the officer who imposed it. Further, Petitioner's argument that it was unfair to reduce him, when [REDACTED] reduction for the same misconduct was suspended, is meritless. Petitioner's punishment was based on full consideration of all the attendant circumstances of both the offense and the accused. It is reasonable on its face to treat a sergeant more harshly than a lance corporal when the two commit an offense that undermines the rank structure.

e. Petitioner's claim that he would not have accepted NJP had he known that it would affect his acceptance to MECEP is without merit. Petitioner maintains that, as a result of his reduction at NJP, he was denied final assignment to MECEP. Petitioner was apparently never even selected for MECEP¹, however. Further, whether a service member understands all of the possible career consequences of accepting NJP is irrelevant to the issue of whether that acceptance is voluntary.² All that is necessary is that he understand his rights, and that he make a voluntary election in the waiver or exercise of those rights. The record of proceedings in Petitioner's case makes clear that he did understand those rights, and that he voluntarily accepted NJP.

5. Conclusion. Accordingly, for the reasons noted, we recommend that Petitioner's request for relief be denied.

[REDACTED]
Head, Military Law Branch
Judge Advocate Division

¹ Neither the FY99 nor the FY00 MARADMIN, enclosures (1) and (2), announcing the MECEP selection board results reflect that he was selected for MECEP.

² 10 U.S.C. §2005 does require, in cases of a service member who has received educational benefits that are subject to a reimbursement requirement, that the member be advised of possible recoupment action before making a decision regarding adverse actions, to include NJP. As noted, however, Petitioner had not been selected for MECEP, let alone incurred any recoupment obligation under the program.